No. 10357

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MARY T. MARIN, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The district court did not write an opinion. Its judgment, stating the reason for dismissal, is printed in the record at pages 34 to 36.

JURISDICTION

This is an appeal from a judgment of dismissal entered November 27, 1942 (R. 34–36). Notice of appeal was filed November 28, 1942 (R. 37). The jurisdiction of the district court was invoked under the Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C. sec. 257 (R. 3). The jurisdiction of this Court is invoked under section 128 of the Judicial Code, as amended, 28 U. S. C. sec. 225 (a).

QUESTIONS PRESENTED

1. Whether the Constitution empowers the United States to condemn land for use by a private corporation in the production of steel forgings for naval purposes.

2. Whether a judgment on a declaration of taking is final and appealable and, if so, whether, after the time for appeal has expired, such judgment is a conclusive determination of the issue as to public use.

STATUTES INVOLVED

The material portions of the Act of July 29, 1941, c. 328, 55 Stat. 608; Act of August 25, 1941, c. 409, 55 Stat. 669, and the Second War Powers Act of March 27, 1942, c. 199, Public No. 507, 77th Cong., 2d Sess., are set out in the appendix *infra* p. 16–18.

STATEMENT

This proceeding was commenced on February 9, 1942, by the filing of the Government's complaint to condemn 1.9 acres of land in Berkeley, California. At the same time, a declaration of taking was filed pursuant to the Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. sec. 258a, and estimated compensation of $26,651.00 was deposited in court. Of the sum deposited, $1,200.00 was allocated to parcel 75 owned by Mary T. Marin. On the same day, an ex parte judgment was entered declaring that the United States was entitled to acquire the property for the purposes stated, confirming the passage of title by the declaration of taking, and ordering the immediate delivery of possession (R. 2–21).

Mary T. Marin filed an answer on March 16, 1942, asserting ownership of Lot 75 and alleging that the taking was not for public use (R. 21–25). Trial as to parcel 75 was called for November 13, 1942. Motion to dismiss was made and the Government was permitted to amend the complaint (R. 26). As amended, the complaint alleged that the proceedings were brought pursuant to six designated statutes and alleged (paragraph II):

> That the land hereinafter described is taken and condemned under the authority of the above-mentioned Acts of Congress for the uses and purposes authorized by said Acts, and is sought and taken by the plaintiff for the establishment of essential equipment and facilities for the expansion of the American Forge Company, Berkeley, California, for use in the production of steel forgings for naval purposes; that said use of said land constitutes a public use and said lands have been selected by the Acting Secretary of the Navy for acquisition for said purposes and uses above stated * * * (R. 28–29).

The motion to dismiss was renewed and, the Government having declined to amend further, judgment of dismissal was entered on November 27, 1942 (R. 30–36). After setting forth the purpose of the taking, the judgment stated (R. 36):

> * * * and it further appearing to the Court that the use and purpose for which said real property is sought and taken is for a private use and not for a public use * * *.

The Government had gone into possession of the property in February 1942, had commenced construc-

tion, and at the time Lot 75 was dismissed from the proceeding the project was nearing completion. In fact, the other 21 lots had already been settled by stipulation. In order to prevent irreparable injury the Government promptly filed a notice of appeal (R. 37) and asked this Court for an order staying further proceedings until after the appeal is heard. Judge Wilbur granted such an order on November 30, 1942 (R. 38–40).

SPECIFICATIONS OF ERRORS

The district court erred (R. 46–47):

(1) In dismissing the amended complaint.

(2) In holding that the land was not being taken for public use.

(3) In holding that the complaint and amended complaint did not state a public use.

ARGUMENT

I

Congress has authorized the Secretary of the Navy to acquire lands for use by a private corporation in the production of steel forgings for naval purposes

Congress has expressly authorized the Secretary of the Navy to acquire land for the purpose of expanding private facilities to promote the war effort. The Act of July 29, 1941, c. 328, 55 Stat. 608 appropriated funds for the building and equipping of naval vessels, the repair, alteration or conversion of vessels for naval use, and for the production of ordnance material, etc. The Act authorized execution of the work at "either

private or naval establishments" and provided (Section 2):

> The authority herein granted shall include the authority to acquire lands at such locations as the Secretary of the Navy, with the approval of the President, may deem best suited to the purpose, erect or extend buildings, and acquire the necessary machinery and equipment, and shall be in addition to all authority heretofore granted for these purposes.

A month later in the First Supplemental National Defense Appropriation Act of August 25, 1941, c. 409, 55 Stat. 669, appropriation was made for the necessary tools, equipment and facilities "at naval establishments or private plants" for the production of armor, armament and ammunition and $160,000,000 was appropriated "For essential equipment and facilities of all kinds at either private or naval establishments for the repair and conversion of ships, including the necessary purchase of land." 55 Stat. at 680.

The Second War Powers Act of March 27, 1942, Public No. 507, 77th Cong., 2d sess., authorized various government officers, including the Secretary of the Navy, to acquire by condemnation "any real property * * * that shall be deemed necessary, for military, naval, or other war purposes, * * * and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). The Act of July 2, 1940, c. 508, 54 Stat. 712, had authorized the Secretary of War to provide for the manufacture, etc., of mili-

~~Act of July 2, 1940" (54 Stat. 712). The Act of July 2,~~

tary equipment at public or private plants and provided, section 1 (b):

> (b) The Secretary of War is further authorized, with or without advertising, to provide for the operation and maintenance of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorizations contained in this section and section 5, either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them, and when he deems it necessary in the interest of the national defense, to lease, sell, or otherwise dispose of, any such plants, buildings, facilities, utilities, appurtenances thereto, and land, under such terms and conditions as he may deem advisable, and without regard to the provisions of section 321 of the Act of June 30, 1932 (47 Stat. 412).

From these statutes, it is obvious that the Secretary of the Navy was empowered to promote the repair and enlargement of the Navy by the expansion of private facilities, including the acquistion of land for such purpose.[1] In fact, the primary purpose of the Act of July 29, 1941, c. 328, 55 Stat. 608 was to authorize appropriations for additional naval construction and repair facilities at private yards and industries. The House Committee on Naval Affairs made a detailed

[1] The authority to "acquire" or to "purchase" lands includes, of course, the power to acquire by condemnation, for the Act of August 1, 1888, c. 728, 25 Stat. 357, 40 U. S. C. sec. 257, embraces every case where a government officer is "authorized to procure real estate for the erection of a public building or for other public uses."

report on this matter indicating that of the $460,000,000 applicable to construction and repair of naval vessels only $108,000,000 would be spent on naval yards. H. Rept. No. 934, 77th Cong. 1st sess. (1941).[2] The Committee report listed steel forgings and castings as one of the products "of an already expanded private industry [which] have developed or are developing serious bottlenecks which must be eliminated by further expansion." Ibid., p. 3. And in table 4 of the report (p. 10) the American Forge Company, Niles, California, was listed among the companies "manufacturing facilities for forgings and castings" which might be expected to expand. During the debates in Congress the necessity of the immediate construction of additional facilities at private plants so as to meet the requirements of the expanding Navy was emphasized and particular reference was made to the demand for forgings and castings. 87 Cong. Rec. pp. 6133–6135. Thus, Congress passed the Act of July 29, 1941, for the specific purpose of acquiring the necessary lands and constructing the required buildings so as to enlarge the facilities of private companies engaged in the production of naval materials.

One of the purposes of enactment of Title II of the Second War Powers Act was to confer on the Secretary of the Navy and other government officers the same power to condemn real property for war purposes that had earlier been conferred on the Secretary of War. By the Act of July 2, 1940, the War Depart-

[2] Copies of this report are submitted herewith for the convenience of the court.

ment had been authorized to acquire land for the expansion of privately owned plants as well as government depots. At the time, this authority was particularly important in promoting the tremendous expansion of the aircraft industry. By 1942 it was evident that, among other things, this authority should be granted to other government officers. See 88 Cong. Rec. p. 653. As stated by the Senate Committee, "The necessity for extending the power of the Government to acquire real property during the war period is evident." H. Rept. No. 1765, 77th Cong., 2d sess. (1942) p. 6.[3]

Hence, there can be no dispute that the Secretary of the Navy was specifically authorized to condemn land to be used for the expansion of private forge and casting establishments. And the declaration of taking and complaint expressly declare that the land here involved is being taken for that very purpose (R. 2–13). The Acting Secretary's statement of the purpose for which the land is being acquired is conclusive upon the appellee. *United States* v. *Montana,* C. C. A. 9, No. 10210, decided March 6, 1943. So also the administrative determination that it is necessary and advantageous to the Government to condemn this land is not subject to judicial review. *Oakland* v. *United States,* 124 F. 2d 959 (C. C. A. 9, 1942), certiorari denied 316 U. S. 679 (1942); *United States* v. *243.22 Acres of Land,* 129 F. 2d 678 (C. C. A. 2, 1942), certiorari denied *sub nom. Justine Lambert* v. *United States,* 87 L. Ed. Adv. Op. 402.

[3] Copies of this report are submitted herewith.

II

Congress has the constitutional power to authorize the acquisition of lands for use by a private person for war purposes

In *United States* v. *243.22 Acres of Land,* 129 F. 2d 678 (C. C. A. 2, 1942) certiorari denied sub nom. *Justine L. Lambert* v. *United States,* 87 L. Ed. Adv. Op. 402, the contention that the taking of land for use by a private company was not a taking for a public use was rejected. The proceeding was brought under the Act of July 2, 1940. The landowner attempted to support his contention by evidence that the land was to be used by and title was to be transferred to the Republic Aviation Corporation. This evidence was excluded as immaterial and the ruling was affirmed on appeal, the court stating "The decision of the Secretary of War is not open to judical inquiry. That is fortunate, for if it were open, the ensuing delay would delight our country's enemies."

The instant case presents an identical situation. The Acting Secretary of the Navy has determined that it is necessary to take appellee's lands for naval purposes. The fact that the desired result will be accomplished by use of private facilities rather than by government agencies is immaterial. The authority of the Federal Government to exercise the power of eminent domain may be used whenever it is necessary or appropriate to acquire land in the execution of any of the powers granted by the Constitution. *Kohl* v. *United States,* 91 U. S. 367 (1875); *United States* v. *Gettysburg Electric Railway,* 160 U. S. 668

(1896); *Oklahoma* v. *Atkinson,* 313 U. S. 508 (1941); *Minnesota* v. *United States,* 125 F. 2d 636, 640 (C. C. A. 8, 1942); *Oakland* v. *United States,* 124 F. 2d 959, 964 (C. C. A. 9, 1942), certiorari denied 316 U. S. 679 (1942).

It cannot be doubted that the Act of July 29, 1941, and the Second War Powers Act are constitutional under the Federal Government's defense and war powers. U. S. Const., Art. I, sec. 8. No argument is needed to show that the war required the immediate expansion of the Navy by every possible means and that, under the conditions existing in 1941, such expansion might best be accomplished by utilizing and expanding private industry. Limitation to government-operated plants would have seriously impeded the war effort.

The Constitution does not impose any such limitation. On the contrary "when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation." *United States* v. *Gettysburg Electric Railway,* 160 U. S. 668, 680 (1896). Congress may use any appropriate means to accomplish a legitimate purpose. *Luxton* v. *North River Bridge Co.,* 153 U. S. 525, 529–530 (1895). The fact that in execution of a public purpose, lands condemned are sold to individuals does not render the taking invalid. *Brown* v. *United States,* 263 U. S. 78, 81–82 (1923). Clearly Congress has the power to protect the nation by any means which the necessities of

the situation may require even though accomplishment involves private use of lands condemned. In *Highland* v. *Russell Car Co.,* 279 U. S. 253 (1929), Justice Butler, in sustaining a 1917 coal price regulation as applied to a manufacturer of snow plows for railroads, stated (p. 260): "Unquestionably the production of such equipment was, in the state of war then prevailing, a public use for which coal and other private property might have been taken by exertion of the power of eminent domain." If the taking of coal for use by a private manufacturer in the production of snow plows for use by railroads is a public use, obviously the taking of land for use in the production of naval equipment is a public use.

The authorities cited by appellee to support her motion (R. 31) do not sustain the dismissal. *United States* v. *243.22 Acres* directly supports the Government's position (see *supra* p. 9). In *United States* v. *Threlkeld,* 72 F. 2d 464 (C. C. A. 10, 1934), certiorari denied 293 U. S. 620, the taking was similarly sustained. In *Cincinnati* v. *Vester,* 281 U. S. 439 (1930) the decision was based upon the Ohio statute, and the court specifically declined to pass upon the constitutional question. *Ex Parte Milligan,* 4 Wall. 2 (1866), relating to the war power as applied to the availability of writs of habeas corpus is obviously irrelevant.

It follows that the court below erred in dismissing the Government's complaint.

III

If the judgment on the declaration of taking was appealable, it is res judicata upon the right of the United States to acquire the property

Pursuant to the usual practice in declaration of taking cases the district court on February 9, 1942, entered an ex parte judgment declaring that the United States was entitled to acquire the property for the purposes stated, confirming the passage of title by the declaration of taking, and ordering the immediate delivery of possession (R. 17–21). In *Oakland* v. *United States,* 124 F. 2d 959 (C. C. A. 9, 1942) the Government contended that a similar judgment was not final and appealable and hence requested that the appeal be dismissed. However, this Court affirmed the decision rather than dismissing the appeal. Shortly thereafter a landowner appealed to the Circuit Court of Appeals for the Second Circuit from a judgment of condemnation before compensation had been determined. *United States* v. *243.22 Acres of Land,* 129 F. 2d 678 (C. C. A. 2, 1942). The United States contended that such appeal should be dismissed on the ground that a condemnation judgment is final and appealable only when all questions of title and damages have been determined. *Luxton* v. *North River Bridge Co.,* 147 U. S. 337, 341 (1893); *Southern Ry. Co.* v. *Postal Telegraph Co.,* 179 U. S. 641, 643 (1901); *Grays Harbor Co.* v. *Coats-Fordney Co.,* 243 U. S. 251, 256 (1917); *Wick* v. *Superior Court,* 278 U. S. 575 (1928); *Dieckmann* v. *United States,* 88 F. 2d 902

(C. C. A. 7, 1937). The court, however, rejected this contention placing some reliance on the action taken by this Court in the *Oakland* case. See 129 F. 2d at p. 683.

In November 1942 the Circuit Court of Appeals for the First Circuit held that a judgment on a declaration of taking was final and appealable. *Puerto Rico Railway Light and Power Company* v. *United States,* 131 F. 2d 491 (C. C. A. 1, 1942). It held that *United States* v. *243.22 Acres of Land, supra,* was squarely in point and also relied on the *Oakland* decision. The court recognized that the judgment on the declaration of taking does not pass title but stated that in granting the Government's motion for possession "The court necessarily has to decide, as it did here, that the taking was duly authorized by law." 131 F. 2d at p. 494, fn. 2. Thus, the *Puerto Rico* case holds that entry of the judgment on the declaration of taking is necessarily a decision that the taking is for public use.

In the instant case the judgment on the declaration was entered on February 9, 1942 (R. 17–21). The time for appeal therefrom expired on May 9, 1942. If, as stated in the *Puerto Rico* case, entry of the judgment necessarily included a decision that the taking was for public use and such judgment was final, then the judgment was conclusive and appellee's motion to dismiss made on November 13, 1942 (R. 25–26), should have been denied.

Nevertheless, the Government adheres to its position that the judgment on the declaration of taking is not

final and appealable. As pointed out in the *Oakland* brief (p. 14) the judgment is useful for recording purposes. It does not pass title. The reasoning of the court in the *243.22 Acres* case seems to rest upon a failure to recognize this fact because the only factual distinction of *Luxton* v. *North River Bridge* and other cases which follow the same rule lies in application of the Declaration of Taking Act. The Government believes that the judgment on the declaration of taking does not, as the court held in the *Puerto Rico* case, finally decide the question of public use but rather, as this court held in the *Oakland* case, that question is left open for future decision. No substantial distinction appears between an order overruling a motion to dismiss in the ordinary case and the order denying the motion to vacate the judgment on the declaration of taking involved in the *Oakland* case or the similar order in the *Puerto Rico* case.[4] An order overruling a motion to dismiss or a demurrer is, of course, not final and appealable.[5] No reason appears why the order is of a different nature when a declaration of taking is involved.

The United States submits, therefore, that neither a judgment on a declaration of taking nor an order overruling a motion to vacate such judgment is appeal-

[4] An order denying a motion to vacate a nonappealable order is, of course, not appealable. *Republic Supply Co. of California* v. *Richfield Oil Co.*, 74 F. 2d 909 (C. C. A. 9, 1935).

[5] An order sustaining a motion to dismiss is also interlocutory. Appeal lies only when, as in the present case, the order is followed by a final judgment dismissing the proceeding. See *Western Electric Co.* v. *Patent Reproducer Corporation*, 37 F. 2d 14 (C. C. A. 2, 1930), and cases there cited.

able. It follows that, as this Court held in the *Oakland* case, the question of public use was properly raised by the motion to dismiss made in November 1942.

CONCLUSION

It is submitted that the judgment of the district court should be reversed.

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APPENDIX

The Act of July 29, 1941, Chapter 328, 55 Stat. 608, is as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, $300,000,000 for essential equipment and facilities at either private or naval establishments for building or equipping any complete naval vessel or portion thereof heretofore or hereafter authorized; $160,000,000 for essential equipment and facilities at either private or naval establishments for repairing, altering, or converting any vessel operated by the Navy or being prepared for naval use; and $125,000,000 for essential equipment and facilities for the manufacture or production of ordnance material, munitions, and armor at either private or naval establishments.
>
> SEC. 2. The authority herein granted shall include the authority to acquire lands at such locations as the Secretary of the Navy, with the approval of the President, may deem best suited to the purpose, erect or extend buildings, and acquire the necessary machinery and equipment, and shall be in addition to all authority heretofore granted for these purposes.

The Act of August 25, 1941, Chapter 409, 55 Stat. 669, 680 provides:

> Construction and machinery: The limitation on obligations for tools, facilities, and equipment for building or equipping any complete

naval vessel or portion thereof contained in title VI of the Naval Appropriation Act for the fiscal year 1941 (Fourth Supplemental National Defense Appropriation Act, 1941) is increased to $800,000,000.

Armor, armament, and ammunition: The Secretary of the Navy is authorized to transfer $11,000,000 of the funds heretofore appropriated under this heading to the War Department for War Department facilities for the loading and assembling of 20-millimeter ammunition and the limitation of obligations for the necessary tools, equipment, and facilities at naval establishments or private plants for the manufacture or production of ordnance material, munitions, and armor contained in title VI of the Naval Appropriation Act for the fiscal year 1941 (Fourth Supplemental National Defense Appropriation Act, 1941) is increased to $425,000,000.

The Second War Powers Act of March 27, 1942, Chapter 199, Public Law 507, 77th Congress, 2d Session, provides:

Title II—Acquisition and Disposition of Property

SEC. 201. The Act of July 2, 1917 (40 Stat. 241), entitled "An Act to authorize condemnation proceedings of lands for military purposes," as amended, is hereby amended by adding at the end thereof the following section:

"SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used

therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended."

Section 1 of the Act of July 2, 1940, 54 Stat. 712, Chapter 508, provides:

(b) The Secretary of War is further authorized, with or without advertising, to provide for the operation and maintenance of any plants, buildings, facilities, utilities, and appurtenances thereto constructed pursuant to the authorizations contained in this section and section 5, either by means of Government personnel or through the agency of selected qualified commercial manufacturers under contracts entered into with them, and when he deems it necessary in the interest of the national defense, to lease, sell, or otherwise dispose of, any such plants, buildings, facilities, utilities, appurtenances thereto, and land, under such terms and conditions as he may deem advisable, and without regard to the provisions of section 321 of the Act of June 30, 1932 (47 Stat. 412).

U. S. GOVERNMENT PRINTING OFFICE: 1943